Supreme Court, U. S.
FILED
JUN 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1766

STANLEY FLEISHMAN,

Petitioner,

vs.

EVERETT ARTHUR MCFEE and JACK C. GREENLEES,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California in and for the Second Appellate District, Division Five.

SAM ROSENWEIN,
4255 Agnes Avenue,
Studio City, Calif. 91604,
(213) 769-1742,
Attorney for Petitioner.

JOHN T. MCTERNAN,
Of Counsel.

12/29/75

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
How Federal Questions Are Presented	5
Reasons for Granting the Writ	17
Conclusion	30

INDEX TO APPENDICES

Appendix A. Opinion and Judgment of the Court of Appeal	App. p. 1
Appendix B. Order of Court of Appeal Denying Rehearing	12
Appendix C. Order of California Supreme Court Denying Hearing	13
Appendix D. Constitutional and Statutory Provisions Involved	14

TABLE OF AUTHORITIES CITED

Cases	Page
Adey v. United Action for Animals, Inc., 361 F. Supp. 457 (D.C. N.Y. 1973), aff'd. 493 F.2d 1397 (2 Cir. 1974), cert. den. 419 U.S. 842	26
Alexander v. Lancaster, 330 F.Supp. 341 (D.C. La. 1971)	27
American Railway Express Co. v. Levee, 263 U.S. 19	2
Beckley Newspapers Corp. v. Hanks, 389 U.S. 81	20, 22, 26
Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5 Cir. 1970)	26, 29
Cox Broadcasting Corp. v. Cohn, 95 S.Ct. 1029	27
Dacey v. Florida Bar, Inc., 427 F.2d 1292 (5 Cir. 1970)	26
Garrison v. Louisiana, 379 U.S. 64	18, 19, 22, 24, 27
Gooding v. Wilson, 405 U.S. 518	28
Greenbelt Cooperative Public Publishing Association, Inc. v. Bresler, 398 U.S. 6	19, 22, 26
Griffin v. California, 380 U.S. 609	22
Guitar v. Westinghouse Electric Corp., 396 F. Supp. 1042 (D.C. N.Y. 1975)	26
Henry v. Collins, 380 U.S. 356	20, 22
LaBruzzo v. Associated Press, 353 F.Supp. 959 (D.C. Mo. 1973)	26
Lewis v. City of New Orleans, 408 U.S. 913	28
Lewis v. City of New Orleans, 415 U.S. 135	28

	Page
Linn v. United Plant Guard Workers, 383 U.S. 53	20
Meeropol v. Nizer, 381 F.Supp. 29 (D.C. N.Y. 1974)	26
New York Times Co. v. Sullivan, 376 U.S. 254	2, 3, 4, 5, 8, 15, 16 17, 18 19, 21, 22, 23, 24, 26, 27, 28, 29, 30
Novel v. Garrison, 338 F.Supp. 977 (D.C. Ill. 1971)	27
Porter v. Guam Publications, Inc., 475 F.2d 744 (9 Cir. 1973)	26
Rosenblatt v. Baer, 383 U.S. 75	19, 27
Rosenbloom v. Metromedia, Inc., 403 U.S. 29	20, 22, 26
St. Amant v. Thompson, 390 U.S. 727	24, 25, 26
Thuma v. Hearst Corp., 340 F.Supp. 867 (D.C. Md. 1972)	26
Time, Inc. v. Hill, 385 U.S. 389	27, 28
Time, Inc. v. Pape, 401 U.S. 277	26
United Medical Laboratories v. Columbia Broadcasting System, 404 F.2d 706 (9 Cir. 1969)	26
Vandenburg v. Newsweek, Inc., 507 F.2d 1024 (5 Cir. 1975)	26
Walker v. Pulitzer Publishing Co., 394 F.2d 800 (8 Cir. 1968)	26
Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966)	20, 26, 29
Watts v. United States, 394 U.S. 705	28

Rules — Page

Federal Rules of Evidence, Rule 403 23

Statutes

California Civil Code, Sec. 46 3
California Civil Code, Sec. 47 3
California Civil Code, Sec. 47(3) 6
California Civil Code, Sec. 48 3
California Evidence Code, Sec. 776 10
United States Code, Title 28, Sec. 1257(3) 2
United States Constitution, First Amendment 2, 3, 6, 8, 16, 17, 23, 29
United States Constitution, Fourteenth Amendment 2, 3, 6, 8, 16

Textbook

Emerson, The System of Freedom of Expression (1970), p. 532 22

IN THE

Supreme Court of the United States

October Term, 1975
No. .....

STANLEY FLEISHMAN,

Petitioner,

vs.

EVERETT ARTHUR McFEE and JACK C. GREENLEES,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California in and for the Second Appellate District, Division Five.

Petitioner, Stanley Fleishman, prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California in and for the Second Appellate District, Division Five, entered in the above-entitled case on December 29, 1975.

Opinion Below.

The opinion of the Court of Appeal of the State of California in and for the Second Appellate District, Division Five, is unreported. A copy of the opinion appears in Appendix A hereto. No written opinion was rendered by the Supreme Court of the State of California denying a petition for hearing.

Jurisdiction.

The judgment of the Court of Appeal of the State of California in and for the Second Appellate District, Division Five (Appendix A), was entered on December

29, 1975. A due and timely petition for rehearing was filed with the Court of Appeal and denied on January 28, 1976. A copy of the order denying rehearing appears in Appendix B hereto. A due and timely petition for hearing by the California Supreme Court was denied on March 10, 1976. A copy of the order denying hearing appears in Appendix C hereto. The judgment of the Court of Appeal is therefore the final judgment of "the highest court of a State in which a decision could be had". The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). See, *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21.

Questions Presented.

1. Whether the court below erred in holding that proof of ill will, hatred and animosity is admissible in a defamation action brought by public officials against petitioner, an attorney, for alleged defamatory statements made during a public address, the case being concededly governed by the standards of the First and Fourteenth Amendments and the interpretive opinions of the Court in *New York Times v. Sullivan* and related decisions.

2. Whether the court below erred in holding that proof of ill will, hatred and animosity is admissible in a case governed by the First and Fourteenth Amendments and *New York Times v. Sullivan* to "help prove" the requisite actual malice.

3. Whether the court below erred in reversing the judgment of non-suit when the trial judge held, as a matter of order of proof, that in a case governed by the First and Fourteenth Amendments and *New York Times v. Sullivan*, the public officials were required to first prove actual malice before evidence of ill will, hatred and animosity could be offered.

4. Whether, contrary to the provisions of the First and Fourteenth Amendments and the interpretive decisions of the Court in *New York Times v. Sullivan* and related cases, the court below erred in reversing the judgment of non-suit when the record is devoid of any evidence, clear or convincing, that petitioner made any defamatory statements concerning respondents with requisite actual malice.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the provisions of California Civil Code §§46, 47 and 48 appear in Appendix D hereto.

Statement.

Petitioner, an attorney with extensive experience in obscenity cases and related litigation, on both trial and appellate levels, was invited by officials of a private school in Los Angeles to deliver a speech at the school in 1968. The meeting and petitioner's subject, involving censorship of plays and other media of communication, were announced in the press. The meeting was open to the public for a small admission charge and was attended by approximately fifty people. Two vice squad officers, dressed in civilian clothes, attended the meeting and sat in the front row with a tape recorder. They were there at the direction of a superior officer. Petitioner's address to the audience commented generally on problems relating to censorship and the actions of police officials, whose conduct often exceeded proper legal bounds and chilled the ability of counsel to proper-

ly represent those charged with violations of obscenity laws. In the course of his address, petitioner noted that harassment by police officers can be frightening even to counsel, because things are planted on people from time to time, and in answer to a question from the audience after the speech as to what happened to the materials that the police confiscate, petitioner replied that all he could say was that much of it gets lost. A transcript of petitioner's speech was introduced into evidence at the trial herein. The two vice squad officers who attended the meeting subsequently claimed that they had been slandered by petitioner. While the transcript gave no indication that the statements with respect to planting of evidence or the disappearance of seized materials were particularly ascribed to the said officers, they nevertheless urged that petitioner had "gestured" in their direction while speaking. Although the officers had a tape recorder with them, no tape or transcript of a tape was ever offered by the officers in contradiction of the transcript which was admitted into evidence at the trial.

At the trial, the respondent officers testified in their slander action that they had never planted evidence nor kept allegedly obscene material which they had seized for their own purposes. The two vice squad officers stated that they were acquainted with petitioner over a long period of time and had been on opposite sides to petitioner in much litigation in Southern California. The officers then sought to introduce evidence of petitioner's iil will, spite and dislike of the officers. The trial court held that, in the light of *New York Times v. Sullivan* and subsequent decisions of this Court, such evidence could not be presented to the jury until there had at least been a showing made

that petitioner's statements were knowingly false or made with reckless disregard of whether they were true or false. No such showing was made, and the trial court granted a motion for non-suit. On appeal, the court below held that the vice officers were undoubtedly public officials under the *New York Times* rule, but held that while "ill-will malice cannot be the *only* basis for a finding of malice in cases involving public officials (*Garrison v. Louisiana,* 379 U.S. at p. 73), we hold that evidence of ill-will malice can be introduced to help prove the *New York Times* standard of 'reckless disregard.' "

How Federal Questions Are Presented.

1. On December 5, 1968, respondents filed a complaint for slander against petitioner in the Superior Court of the State of California for the County of Los Angeles [C.T. 1].[1] Following the grant of a demurrer, respondents filed an amended complaint [C.T. 19-25]. Each of the respondents alleged that he was a deputy sheriff employed by the sheriff of Los Angeles County; that an article appeared in the public press reporting that petitioner was scheduled to give a speech at the Oakwood Upper School in the City and County of Los Angeles; that the talk to be given by petitioner was to be given as a part of a series of cultural résumés; that the topic was "Censorship and the Sexual Revolution and The Beard"; that each respondent, in keeping with his assignment in the Sheriff's Vice Bureau, "was interested in hearing this lecture"; that petitioner had told the audience that respondents were there to harass him and the

[1]The reference "C.T." is to the Clerk's Transcript on appeal to the Court of Appeal below.

audience; that the petitioner had made a number of defamatory statements concerning respondents, including statements that would lead the audience to believe that respondents planted evidence or contraband on people and kept obscene literature and photographs for their own purposes which they had seized as deputy sheriffs working for the Vice Detail; that the statements were untrue and known by petitioner to be untrue; that the action of the petitioner was malicious; and that it was "his motive and desire to vex, harass, annoy and injure" respondents. Each of the respondents prayed for general damages in the sum of $100,000 and for punitive damages in the sum of $200,000. The petitioner's demurrer to the amended complaint was overruled. The demurrer [C.T. 27-32] alleged, among other things, that the amended complaint failed to state facts sufficient to constitute a cause of action in that the California Civil Code defining slander, as construed or applied, was unconstitutional, null and void, violating the "privilege required by the Free Speech and Press provisions of the First and Fourteenth Amendments to the United States Constitution" [C.T. 28].

In his answer [C.T. 39], petitioner, as an affirmative defense, alleged, *inter alia*, that respondents were public officials, and to the extent that petitioner made any defamatory statements regarding respondents in the discharge of their official duties, said statements were made without malice, and therefore were privileged pursuant to the provisions of the First and Fourteenth Amendments.[2]

[2]Affirmative defenses [C.T. 38] based on the conditional privilege contained in §47(3) of the California Civil Code were withdrawn. Early in the trial, counsel for petitioner abandoned the defenses predicated upon the state Civil Code section [R.T. 101].

A motion by petitioner for summary judgment was thereafter denied. The respondents' declarations in opposition to the motion for summary judgment [C.T. 48-52] were offered for the purpose of demonstrating petitioner's alleged "actual malice and hatred and ill will" toward the respondents [C.T. 50], the respondents detailing various past litigations in which the respondents, on behalf of the Vice Bureau, and petitioner, as attorney for various defendants, had opposed each other.

2. Prior to trial, the parties stipulated that respondents were withdrawing all allegations of defamatory utterances alleged in the complaint except the two utterances allegedly made by petitioner with respect to the planting of evidence and the disappearance of evidence seized in cases [R.T. 9].[3] The trial commenced on March 26, 1973, before the Honorable Thomas C. Murphy, a Judge of the Superior Court of the State of California, County of Los Angeles, and a jury. In his opening statements to the jury, counsel for respondents stressed that the petitioner on prior occasions had represented persons who had been arrested by respondents; that respondents had been prosecuting officers in cases that petitioner had defended; that evidence would be produced which would indicate that petitioner "did not like these people"; that petitioner made "certain statements and threats to them"; that petitioner "exhibited a fierce temper on occasion with these men"; and that lawsuits brought by petitioner on behalf of clients, against respondents as police officers, had been unsuccessful [R.T. 7-G, 7-H].

[3]The reference "R.T." is to the Reporter's Transcript on appeal to the Court of Appeal below.

Following the opening statements, counsel for petitioner moved the court for a ruling *in limine* that the evidence "involving personal ill will and hatred and enmity" on the alleged part of petitioner be excluded. It was urged that such ruling was necessary to protect the First Amendment liberties involved in the case; that to make any statements actionable, it had to be shown by clear and convincing evidence that they were uttered with malice, *i.e.*, with knowledge of falsity or reckless disregard of whether they were true or not [R.T. 25]. In denying the protective order requested at that time, the trial judge stressed that respondents would be given a chance to prove their case, but that the standards set forth in *New York Times v. Sullivan* would have to be met as required by the First and Fourteenth Amendments to the United States Constitution [R.T. 53]. Petitioner then moved the court for an order excluding any evidence "dealing with personal ill will, hostility, enmity, intent to do harm" on the part of petitioner toward either of the respondents until respondents had made "a prima facie showing of actual malice that satisfies the New York Times standard" [R.T. 53]. Counsel for respondents opposed the motion, claiming that a *prima facie* case required no more than testimony of the respondents denying the truth of the alleged defamatory statements, from which the jury could infer the required reckless disregard [R.T. 54]. Counsel for respondents insisted that if he could not prove "this longstanding animosity between the parties," then parties situated like respondents would be left "with nothing" [R.T. 54-56]. Following extensive argument, the trial judge ruled as follows:

> "My order of proof is that your prima facie case, before you go into ill will, the specific acts of ill will, hostility, or feelings, will satisfy me that the New York Times rule of—I want to make sure I've got my notes—you've got to first of all show me that the statement knowingly was false or there was a reckless disregard of the truth, and then I'll go on from there." [R.T. 63].

Thereafter, counsel offered as his first witness the respondent Greenlees [R.T. 73]. The witness testified that petitioner in the course of his speech said that "these fellows go around planting things on people so they can make a crime out of it and arrest them" [R.T. 85]. The witness stated that "he gestured in our direction and looked at us when he made the comment" [R.T. 85]. The witness also testified that petitioner was asked from the audience after petitioner's speech had been concluded as to "What happens to all of this evidence or obscene matter that these officers confiscate?", and the petitioner allegedly replied "I don't know. A lot of it has a way of disappearing. Why don't we ask these officers here to explain themselves?" [R.T. 85]. The witness then testified that he had never planted any evidence or "stole any evidence." [R.T. 86].[4]

At this point, counsel for respondents "offer[ed] to prove a continuous course of conduct showing animosity between the parties, animosity by Mr. Fleishman, the defendant, directed at this plaintiff, . . ." [R.T. 88]. The trial judge again ruled: "I conclude that under the New York Times versus Sullivan and the

---

[4]The other officer, respondent McFee, was never called to testify. It was stipulated that if he were called he would testify that he never planted anything or took evidence unlawfully [R.T. 224].

cases that follow, *et seq.*, that actually the United States Supreme Court has limited the state libel clause in setting a standard that requires a clear and convincing proof that the defamatory falsehood was uttered, knowing that it was false or with such reckless disregard whether it was false or not. . . . Now, I'm going to rule at this time that evidence of ill will, bad motive, or hostility, are not actually elements of the New York Times case . . . this evidence that's being offered of ill will, bad motive, or hostility, even if admitted, wouldn't come within that standard, and I'm going to rule at this time that it's not admissible." [R.T. 103-104]. The trial judge further observed that if he were "to permit this evidence in now and then try to eradicate it or erase it by the instructions, we may be creating more problems than we're solving." [R.T. 105].

Thereupon, counsel for respondents called the petitioner as a witness on behalf of the respondents under provisions of §776 of the California Evidence Code authorizing examination of an adverse party. The petitioner testified and offered into evidence a document containing a transcript of his remarks at the Oakwood School [Exh. A; R.T. 173-175]. With respect to the statements made by petitioner the transcript of the speech indicated clearly that petitioner was discussing police conduct generally; that police had made hundreds of arrests which had proven to be wrong; that police engaged in harassment; that they had a lot of power and did frighten people and that petitioner himself was frightened of them and that he did know that they plant things on people from time to time; and that this was much to be feared since it was easy to intimidate people [R.T. 175-177]. The petitioner

further stated in his speech, as shown by the transcript, that in reply to a question from the audience as to what happens to the material the police confiscate, the petitioner replied: "All I can say is much of it gets lost" [R.T. 178]. The petitioner testified further that in connection with neither the planting of evidence statement nor the removal of seized evidence statement did he gesture or point toward respondents [R.T. 154, 178]. The petitioner maintained, as the transcript revealed, that he had not made the statements attributed to him.

In reply to inquiries by counsel, petitioner testified that at the time he made his speech to the audience, he had a belief that respondents had planted evidence on people. Petitioner stated that some four or five years before his speech, he had been involved in an obscenity prosecution where officers had entered a building and seized materials, on the basis of which his client was convicted. During a preliminary hearing, petitioner was told by his client that a manuscript for a booklet had been planted in a trash container outside the place of business, and petitioner believed his client and raised search and seizure contentions at the preliminary hearing. Petitioner testified that at the time he made his speech, he was under the impression that both of the respondents had worked together in the same criminal case, but stated that after the speech he learned that respondent McFee had been in the case and not the other respondent [R.T. 117-127; 156-157; 167]. While reiterating that he had spoken generally and never pointed or gestured at respondents [R.T. 154]. petitioner testified that the bases for his beliefs were not only those in particular, but those generally with respect to police practices. These beliefs

were derived from an extensive law practice in connection with litigation where police officers were involved; from the extensive reading of literature and research in areas involving police misconduct; and from a vast amount of information received from other lawyers, newspaper articles, and files of such organizations as the American Civil Liberties Union [R.T. 159-168; 198-201].

Petitioner further testified, as the transcript of his speech showed, that there had been a question from the audience with respect to what happened to the evidence seized in obscenity cases. The petitioner had stated in reply that he did not know; that all he knew was that a lot of the material got lost [R.T. 168]. As the basis for his belief, petitioner testified from specific experience with evidence that had disappeared in cases where respondents had been involved as law enforcement officers. Petitioner testified that in three related cases a large amount of material had been seized and the material was ordered returned before the prosecution was concluded. Some of the material was returned and some was not. The petitioner testified that respondents were among the officers involved in those cases [R.T. 188-192]. There were other proceedings in which there were massive seizures of material where, in a number of cases, all of the material was not returned [Exh. B; R.T. 193-198].

At this stage of the proceedings, counsel for respondents stated that since the court had limited counsel to proof of *New York Times* malice before counsel

could get down to "regular malice proof", counsel had "in the record all that I can prove in that regard" [R.T. 203-204]. The trial judge therefore stated it was his ruling "at this time that the Plaintiffs have not made out a prima facie showing of actual malice to satisfy the New York Times standard" [R.T. 230]. The court stated that where "actual malice has not been shown, there's going to be no further evidence at this time of ill will, hostility or intent to do harm" [R.T. 231].

Thereafter, the respondents called only one other witness, one James J. Clancy. The witness, at the time he testified, was counsel to the Citizens for Decent Literature, and as counsel he had participated in the initiation of prosecutions for claimed violations of the obscenity laws in the State of California and of local laws in the same field [R.T. 257]. The witness testified that he had been a prosecutor at the trial of the action which had occurred some five years before the petitioner's speech at the school, and about which petitioner had previously testified with respect to information given to him by his client relative to the planting of a manuscript in a garbage bin allegedly found by police officers. The witness Clancy testified that his "personal opinion of [petitioner's] character for truth and veracity" was "bad" [R.T. 253] and that he would not believe petitioner under oath "in obscenity matters" [R.T. 253]. Mr. Clancy testified that petitioner's client had been convicted of a felony in the proceeding in which petitioner represented him

[R.T. 237], and according to Clancy, it was a prosecution witness employed by petitioner's client who testified at the trial that the evidence taken by the police from the trash barrel had been placed there by the witness [R.T. 252-253]. The witness Clancy conceded that he had been "on opposite sides" of petitioner for thirteen years and that his position on the enforcement of the obscenity laws generally had been one in opposition to that taken by petitioner [R.T. 259-287].

The respondents having rested at this point [R.T. 290], the trial judge again pointed out to counsel for respondents that the court's position remained unchanged and the point had not yet been reached to go to the jury on "bad motive, intent to injure, and hostility" [R.T. 298]. Counsel for respondents then having stated that he had nothing further to offer, counsel for petitioner moved for a judgment of nonsuit on the ground that there had been "no showing satisfying the constitutional standards of malice as defined in New York Times v. Sullivan and the succeeding cases" [R.T. 299]. The court granted the motion and found, among other things, that the respondents were public officials; that the subject matter of the speech was of public and general interest; that New York Times was controlling and required evidence of clear and convincing proof that the alleged false statements were made with knowledge of their falsity or reckless disregard of their truth or falsity: that the evidence presented by respondents did not meet the New York

Times standards, and therefore "ill will, bad motive, hostility of the speaker toward the Plaintiffs would not be an element at this time"; and that there was not that type of clear and convincing evidence to open up the question of "ill will, hostility or bad motive, as requested by Plaintiffs" [R.T. 300-301].

3. In reversing the judgment of non-suit, the Court of Appeal below in its opinion (App. A) agreed that the respondents here were public officials within the purview of *New York Times v. Sullivan*. The court stated that the principal issue in the case was as follows: "The problem presented in this case is whether or not evidence of 'ill-will malice' may be admitted to prove the New York Times 'actual malice' standard." The court held that respondents were entitled to introduce evidence of the "ill-will malice" between petitioner and themselves to prove that petitioner "made his statements with reckless disregard for the truth". In the view of the Court of Appeal, evidence of ill-will malice could be introduced "to help prove the New York Times standard of reckless disregard".

In his petition for rehearing, petitioner argued that the Court of Appeal had overlooked the fact that the trial judge had merely regulated the order of proof at the trial so as to require the respondents to make a *prima facie* showing of *New York Times* malice before evidence of ill-will malice would be received. Aside from offers of evidence to prove ill will and hostility, all that respondents basically intro-

duced into evidence was evidence that the statements had been made and that they were not true. The trial judge had obviously sought to avoid the prejudice resulting from proof of ill-will malice prior to offering clear and convincing proof of knowledge of falsity or reckless disregard of the truth or falsity. The Court of Appeal made no finding from its résumé of the evidence that *New York Times* malice had in any way been established.

It was also urged on rehearing that the two state decisions relied upon by the Court of Appeal dealing with issues of pleading and proof of common law malice to obviate a conditional privilege were plainly inapplicable in the case herein in the light of *New York Times*. It was further urged by petitioner that the constitutional standards laid down by the United States Supreme Court require that on the issue of malice all evidence of ill will be excluded to safeguard the democratic process. Finally, it was argued that there was no constitutionally sufficient evidence of *New York Times* malice in the case herein which could be "helped" by the evidence of ill-will malice. The petition for rehearing was denied.

In the petition for hearing filed with the California Supreme Court, the petitioner again presented all the aforementioned constitutional issues, with particular emphasis upon the guarantees of the First and Fourteenth Amendments and the interpretive decisions of *New York Times v. Sullivan* and related judgments and opinions which followed thereafter. The petition for hearing by the California Supreme Court was, as aforestated, denied on March 10, 1976.

REASONS FOR GRANTING THE WRIT.

1. The question presented by this case is whether the state court, in reversing the judgment of nonsuit granted by the trial judge in a defamation action initiated by public officials, correctly interpreted and applied the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254, and the decisions and judgments of this Court which followed. The standard which was enunciated in *New York Times* is that a public official who is a plaintiff in a defamation suit must prove that the defamation "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (376 U.S. at 279-280). The Court adopted this position "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" (376 U.S. at 270). The core of the *New York Times* opinion is the theory of democratic self-government; the requirement that the people must have access to information concerning public affairs; and particularly vital that the public receive as much information as possible concerning the characters and activities of public officials.

There is no dispute that petitioner's speech at a public gathering was protected by the First Amendment under the rule established in *New York Times*. The court below agreed that the respondents were "public officials; that they had 'substantial responsibility for or control over government affairs', especially while acting in their official capacity in the area of enforcement of obscenity laws" (App. A). Consequently, under *New York Times* the action against petitioner could

only be sustained upon clear and convincing proof that the alleged defamatory statements were made with knowledge that they were false or with reckless disregard of whether they were false or not. *New York Times* emphasized that mere negligence or bad motives would not support an award for defamation.

The petitioner urges that the court below committed constitutional error when it held that evidence of "ill-will malice" can be introduced in a New York Times action "to help prove" reckless disregard. The *New York Times* privilege was intended to reduce the incentive for critics of official conduct to censor themselves. In drawing the privilege to protect all but calculated or reckless falsehoods, this Court determined that evidence of ill will, spite, or other improper state of mind, could not be part of the constitutional standard. In the case of the privilege granted with respect to criticism of the character and conduct of public officials, this Court held that the privilege was not defeasible upon any other ground than knowing falsehood or reckless disregard of truth. Indeed, in subsequent decisions, the Court held that "reckless disregard of the truth" means false statements made with a high degree of awareness of their probable falsity, and jury instructions which speak of malice in terms of personal spite or ill will are constitutionally deficient under the *New York Times* standard.

In *Garrison v. Louisiana*, 379 U.S. 64, the rule and the reason for the rule were cogently outlined by the Court:

> ". . . Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, 'it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.' . . . Moreover, '[i]n the case of charges against a popular political figure * * * it may be almost impossible to show freedom from ill-will or selfish political motives.' . . . only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government." (379 U.S. at 73-75).

The reiteration of this boundary for protected statements as a means of assuring "breathing space" for enabling critics of public officials to keep citizens informed on matters of public importance, and to prevent self-censorship in this regard, has continually appeared in decisions subsequent to *New York Times*. In *Greenbelt Cooperative Public Publishing Association, Inc. v. Bresler*, 398 U.S. 6, where a jury was permitted to find liability merely on the basis of a combination of falsehood and general hostility, the Court characterized the error as one of "constitutional magnitude, as our decisions have made clear" (398 U.S. at 10). In *Rosenblatt v. Baer*, 383 U.S. 75, where the trial judge had defined malice to include "ill will, evil motive, intention to injure", the Court stated: "This definition

of malice is constitutionally insufficient where discussion of public affairs is concerned" (383 U.S. at 84). In *Henry v. Collins,* 380 U.S. 356, a libel judgment obtained by a county attorney and police chief was reversed by the Court upon the ground that the jury might well have understood the court's instructions "to allow recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood" (380 U.S. at 357). In *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81, the case went to the jury on a definition of existing law which this Court found "clearly impermissible". The jury had been instructed that it could find for the Clerk of the Criminal and Circuit Courts if petitioner in that case had published "with bad or corrupt motive" or "from personal spite, ill will or a desire to injure plaintiff". This was plainly an "erroneous interpretation of *New York Times* at trial" (389 U.S. at 82). "The most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Linn v. United Plant Guard Workers,* 383 U.S. 53, 63. "But ill will toward the plaintiff, or bad motives, are not elements of the New York Times standard." *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 52, n.18. "Malice, under the pre-*Times* practice, was equated with hostility, vindictiveness or negligent disregard of reputation. Under the *Times* test false statements made with these motives alone are not actionable; maliciousness may be shown only through knowledge of falsity or reckless disregard of truth or falsity . . . Proof of a controversial reputation, even of a reputation for indecency or vulgarity, likewise is irrelevant." *Washington Post Co. v. Keogh,* 365 F.2d 965, 972 (D.C. Cir. 1966).

In short, "actual malice" may not be presumed or inferred from proof of motives of antagonism, hatred

or contempt for the plaintiff; nor from proof of intent to inflict harm. The burden is upon the public official to prove by clear and convincing independent evidence that the critic of his conduct knew that the criticism was false or entertained serious doubts concerning its veracity.

2. The trial judge in the case herein repeatedly requested counsel for respondents to offer evidence with respect to knowing falsehood or reckless disregard. No such evidence was forthcoming. The constant endeavor of the respondents was to offer evidence of alleged ill will, hostility and animosity on the part of the petitioner toward the respondents. In granting the judgment of non-suit, the trial judge was plainly correct in holding that no evidence had been presented to satisfy the *New York Times* rule. Nothing singly or in the aggregate of the evidence presented by respondents added up to malice within the definition of *New York Times* and the controlling subsequent opinions of the Court. Respondents concededly had no evidence but alleged "ill will".

The Court of Appeal below expressed no disagreement with the trial judge as to the insufficiency of the evidence under *New York Times.* The judgment of non-suit was reversed because, in the opinion of the Court of Appeal, evidence of the alleged "ill-will malice" between petitioner and respondents was admissible to prove "reckless disregard" of the truth. In the view of the Court of Appeal, proof of ill will, hatred, personal spite and animosity (ill-will malice) was relevant and admissible evidence to establish knowing falsehood and reckless disregard of the truth.

If common law malice can "help prove" *New York Times* malice, then the major postulates which underly

the Court's *New York Times* ruling are critically undermined. What this Court said could not be done directly in *New York Times, Garrison, Greenbelt, Henry* and *Beckley* should not be accomplished indirectly by the rule of law formulated by the state court below. The *New York Times* rule was formulated to protect the system of free expression from suffering serious damage if critics of public officials were not given broad protection. The broad immunity granted was intended to prevent any discouragement of persons from entering into discussion of public issues. The *New York Times* rule is an assurance that persons need not refrain from participating in public discussion for fear that defamation judgments might silence their attacks. "A requirement that the plaintiff show actual malice—knowledge that the statement was false or reckless disregard of whether it was false or not—would seem to be the minimum degree of protection necessary to achieve that end." Emerson, *The System of Freedom of Expression*, 1970, p. 532. It is for that reason that the Court stated in *Garrison* that, "Debate on public issues will not be uninhibited *if the speaker must run the risk that it will be proved in court that he spoke out of hatred*" (Emphasis added).

Moreover, "relevance" cannot in all cases be deemed the indicia of admissibility. It is probably relevant for a jury to consider that an accused has failed to take the stand in a criminal prosecution, but the requirements of the Constitution forbid jury consideration or any prosecutorial comment. See, *Griffin v. California*, 380 U.S. 609. "What the jury may infer, given no help from the court, is one thing, what it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." (380 U.S. at 614).

Indeed, there are many constitutional and statutory privileges which, when exercised, result in the exclusion of what may be deemed relevant evidence. As a general rule, applicable in both civil and criminal cases, relevant evidence may be excluded when the probative value of the evidence is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, or will create substantial danger of confusing the issues, or will create substantial danger of misleading the jury. See, Federal Rules of Evidence, Rule 403.[5] But here, policy considerations of constitutional dimension must also be weighed in the balance. Exclusion of proof of ill will, hostility and animosity is required to assure the protection of public debate and to alleviate the pressures for self-censorship. More is involved here than the mere exclusion of prejudicial evidence. What is involved, emphasized by *New York Times*, is unfettered and uninhibited free exercise of First Amendment rights with respect to the conduct of public officials.

Moreover, the Court of Appeal here refused to even accept the "order of proof" standard which the trial judge formulated in an attempt to satisfy the *New York Times* rule, while leaving open the question of subsequent proof of "ill-will malice". As the trial judge explained again and again to counsel for respondents, the court's ruling was intended only to regulate

---

[5]"The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission." *Advisory Committee's Note*, Rule 403.

the order of proof. To comply with *New York Times,* the trial judge merely held that respondents would be required to make a *prima facie* showing of *New York Times* malice before evidence of ill-will malice would be received. As the trial judge stated: "My order of proof is that your prima facie case, before you go into ill will, the specific acts of ill will, hostility or feelings . . . you've got to first of all show me that the statement knowingly was false or there was a reckless disregard of the truth, and then I'll go on from there." [R.T. 63; see also, R.T. 52-53, 57, 105, 108, 110, 230-232, 289-290, 293-295]. When the respondents failed to present any clear or convincing evidence of *New York Times* malice, the trial judge had no other recourse but to grant the judgment of non-suit. Even this minimal attempt to avoid the irretrievable prejudice which would result from the receipt of ill-will evidence was rejected by the Court of Appeal in favor of a rule which does no more than substitute the common law malice rule for the more stringent *New York Times* malice requirements.

3. Additionally, the respondents failed to present any evidence of "New York Times malice" which purported proof of ill will, hostility and animosity could "help". The record here is devoid of any evidence that petitioner's statements were knowingly false or were made with reckless disregard of the truth. The trial judge was meticulous in his examination for clear and convincing proof of reckless disregard, proof of a "high degree of awareness of [its] probable falsity" (*Garrison v. Louisiana,* 379 U.S. at 74). There was no proof that petitioner's statements were made by one who entertains "serious doubts as to the truth of his publication" (*St. Amant v. Thompson,* 390 U.S.

727, 731). The burden of proof was upon respondents to demonstrate by clear and convincing evidence that the alleged defamatory statements were made with actual malice. Indeed, even with respect to proof of the alleged statements by petitioner, and whether the statements referred to respondents, the evidence in the record is neither clear nor convincing.

Assuming, *arguendo,* that the statements were made by petitioner with reference to respondents, all that the respondents arguably proved was the alleged falsity of the statements. Petitioner testified that at the time he made his speech, he believed that respondents had seized evidence for their own purposes. The basis for his belief was his experience in some six or seven cases in which respondents were the prosecuting officers and petitioner's clients told him that not all of the seized material had been returned. In some of these, the failure to return seized material had been litigated. As to the planting of evidence statement, petitioner had relied on a client whom he was representing. The client had informed him of the planting of evidence in the particular case. That a prosecution witness testified contrariwise is obviously no reason for petitioner's rejecting his client's version. The record amply established that petitioner had a good faith belief in the validity of the statements he made; no inference of awareness of probable falsity could possibly have been drawn. The respondents had unexpectedly appeared at a public meeting, front row center, with a tape recorder, and their presence appropriately invited comment on the performance of their public functions. Petitioner spoke with the facts then presently in his mind. There is nothing in the record which disputes the fact that petitioner had a good faith basis, at

the time and under the circumstances when he spoke, to believe his statements to be true.

An examination of the cases which focused on the question of *New York Times* malice, after deciding that public officials or public figures or matters of public interest were involved, fails to disclose evidence as meager as was presented in the case herein against petitioner. All of these decisions which found no *New York Times* malice arose either on summary judgment, on directed verdicts, on judgments notwithstanding the verdict, or reversals on appeal. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 39-40; *Time, Inc. v. Pape*, 401 U.S. 277, 283-284; *Greenbelt Cooperative Public Publishing Association, Inc. v. Bresler*, 398 U.S. 6, 11; *St. Amant v. Thompson*, 390 U.S. 727, 733; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85; *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1029 (5 Cir. 1975); *Porter v. Guam Publications, Inc.*, 475 F.2d 744 (9 Cir. 1973); *Dacey v. Florida Bar, Inc.*, 427 F.2d 1292, 1296 (5 Cir. 1970); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 863-867 (5 Cir. 1970); *United Medical Laboratories v. Columbia Broadcasting System*, 404 F.2d 706 (9 Cir. 1969); *Walker v. Pulitzer Publishing Co.*, 394 F.2d 800 (8 Cir. 1968), opinion by Blackmun, J.; *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966); *Guitar v. Westinghouse Electric Corp.*, 396 F.Supp. 1042, 1047-1054 (D.C. N.Y. 1975); *Meeropol v. Nizer*, 381 F.Supp. 29 (D.C. N.Y. 1974); *Adey v. United Action for Animals, Inc.*, 361 F.Supp. 457, 462-466 (D.C. N.Y. 1973), aff'd. 493 F.2d 1397 (2 Cir. 1974), cert. den. 419 U.S. 842; *LaBruzzo v. Associated Press*, 353 F.Supp. 959, 982-988 (D.C. Mo. 1973); *Thuma v. Hearst Corp.*, 340 F.Supp. 867 (D.C. Md. 1972); *Novel v. Garrison*, 338 F.Supp. 977, 979 (D.C. Ill. 1971); *Alexander v. Lancaster*, 330 F.Supp. 341, 348-350 (D.C. La. 1971).

4. The questions presented in these proceedings require prompt resolution by this Court, it is respectfully submitted. See, *Cox Broadcasting Corp. v. Cohn*, 95 S.Ct. 1029, 1040-1041. The state court has formulated a rule of law which substantially erodes the national First Amendment policy enunciated by this Court in *New York Times*. The decision of this Court in *New York Times* recognized that freedoms of press and speech are essential to the wide-open discussion of public issues. It was stated that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'" (376 U.S. at 271-272). *New York Times* guarantees to all persons the right to make their thoughts public and to offer them to the community. This has been described as a social necessity required for the "maintenance of our political system and an open society". *Time, Inc. v. Hill*, 385 U.S. at 389. The fundamental basis of such decisions as *New York Times, Garrison, Rosenblatt*, etc., has been the right of the public to know or to be informed about matters relating to public officials and public figures and their conduct in relation thereto.

In *New York Times*, this Court acknowledged public officials to be a group from whom hardiness to exposure to charges, innuendos and criticisms might be demanded and who voluntarily assume the risk of such things by entry into the public arena. "Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence

diminishes their official reputations." *New York Times Co. v. Sullivan,* 376 U.S. at 273. See also, *Time, Inc. v. Hill,* 385 U.S. at 408, opinion of Justice Harlan. In different contexts, this Court has emphasized that public officials such as judges and police officers are expected to display a fortitude against criticism in a climate in which they generally operate. See, *New York Times Co. v. Sullivan,* 376 U.S. at 273, n.13, 14; *Gooding v. Wilson,* 405 U.S. 518, 519-520, n.1. See also, *Lewis v. City of New Orleans,* 408 U.S. 913, opinion of Justice Powell, concurring ("But the situation may be different where such words are addressed to a police officer trained to exercise a higher degree of restraint than the average citizen."); and the same case, 415 U.S. at 135.

In the swirl of a speech made by a lawyer to a public gathering in which he suddenly finds police officers with a tape recorder facing him, police officers who have been involved in much litigation with petitioner for many prior years, it is not unlikely that such police officers will interpret every criticism of police conduct, every expression of opinion, as a reflection of ill will and hostility where every language of hyperbole is elevated into 'defamatory statements about us". *Cf., Watts v. United States,* 394 U.S. 705, 708 ("We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term . . . The language of the political arena like the language used in labor disputes, . . . is often vituperative, abusive, and inexact."). *New York Times* is particularly apt as applied to the circumstances of this case. Truth or falsity is not the constitutional test; the statements must be published with actual knowledge of their falsity or with reckless disregard for their falsity. Freedom

of expression must have a necessary breathing space if it is to survive, and no evidence was presented in this case from which a jury could find that petitioner made his statements with actual knowledge of their falsity or with reckless disregard of whether they were false or not.

In *New York Times* and in the cases which followed, this Court not only set forth the constitutional standards involved, but also exercised an independent judgment in order to review the evidence that had been presented in the case to determine whether the evidence was sufficient to establish *New York Times* malice. In subsequent cases, this Court did not hesitate to move summarily in deciding whether or not state and federal courts had acted properly in granting or denying motions for summary judgment or directed verdicts. The reason has been that in the First Amendment area summary procedures are essential. "For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes." *Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966). See also, *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F.2d 858, 863-866 (5 Cir. 1970).

Petitioner therefore respectfully requests that the Court assume jurisdiction of the cause herein. The strength of the *New York Times* standard is its reliance on the capacity of the public to view public statements in their proper perspective when grievances, suspicions and resentments are being aired. That policy is seriously undermined when proof of ill-will malice is injected into a case brought by public officials where *New York Times* malice solely is involved.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal for the State of California in and for the Second Appellate District, Division Five.

Respectfully submitted,

SAM ROSENWEIN,
Attorney for Petitioner.

JOHN T. MCTERNAN,
Of Counsel.

APPENDIX A.

Opinion and Judgment of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

Everett Arthur McFee and Jack C. Greenlees, Plaintiffs and Appellants, vs. Stanley Fl[illegible]hman, Defendant and Respondent. 2nd Civ. No. 45753 Sup. Crt. No. NC C6407B.

FILED: Dec. 29, 1975.

APPEAL from a judgment of nonsuit of the Superior Court of Los Angeles County. Thomas C. Murphy, Judge. Reversed.

Margolis, McTernan, Smith, Scope and Sacks, and John T. McTernan, for Defendant and Respondent.

Gassman and Sykes and Franklin Bell Gassman, for Plaintiffs and Appellants.

Everett Arthur McFee (McFee) and Jack C. Greenlees (Greenlees) filed a first amended complaint (complaint) for damages for slander against Stanley Fleishman (Fleishman). The complaint alleged[1] that McFee and Greenlees were Deputy Sheriffs of Los Angeles County; that on February 1, 1968, they read a newspaper story to the effect that on February 8, 1968, Fleishman would make a speech at the Oakwood Upper School on the subject "Censorship and the Sexual Revolution and 'The Beard' "; that McFee, in keeping

---

[1]The complaint alleged separate identical causes of action for McFee and Greenlees which we combine for brevity and simplicity.

with his assignment to the Los Angeles County Sheriff's Vice-Bureau, purchased a ticket and accompanied by Greenlees attended the lecture which was attended by approximately fifty other persons; that at said lecture, Fleishman pointed at McFee and Greenlees, calling them by name and stating that they were examples of the "unlawful fascist police state and their sole purpose in being at the meeting is to harass and intimidate" Fleishman and the other citizens present. The complaint alleged that Fleishman also stated "Sergeant McFee and his friend [Greenlees] spend their time going around peeking in citizens windows trying to catch a man and his wife having an orgasm so that they could make a crime out of it" and "these fellows go around planting things on people so that they can make a crime out of it and arrest them." The complaint alleged that Fleishman "intended by the foregoing statement for the audience to believe that your plaintiff and Mr. Greenlees planted evidence or contraband on people so that your plaintiff and Mr. Greenlees could arrest these people as criminals when they were actually innocent persons. That he intended to make the audience believe that your plaintiff and Mr. Greenlees would frame evidence and unlawfully, thereby, obtain convictions of innocent persons." The complaint also quoted Fleishman as stating that McFee and Greenlees used language "in public" which was fouler than that used in "The Beard" specifying the language and that Fleishman, in effect, accused McFee and Greenlees of being guilty of the crime of stealing evidence seized in obscenity cases and using it for their own personal purposes. Fleishman also stated that McFee and Greenlees "never obtained a conviction that stood up, but in their fury continued to intimidate people"

and other statements indicating that McFee and Greenlees were not doing their job as Deputy Sheriffs, but were merely intimidating people while on the public payroll. The complaint alleged that Fleishman's statements were untrue; that they were made with intent to injure, defame and disgrace McFee and Greenlees; that they were made maliciously with the malice and desire to vex, harass, annoy and injure McFee and Greenlees, and proximately caused damages in the sum of $100,000. The complaint sought punitive damages in the sum of $200,000. Fleishman's demurrer was overruled and he answered. A jury was impanelled and after four days of trial, Fleishman's motion for judgment of nonsuit was granted and a judgment of nonsuit was entered. McFee and Greenlees appeal from the judgment.

CONTENTIONS

Appellants contend:

I. That Fleishman's statements were not protected by a qualified privilege because even though they were allegedly made concerning activities of public officials involving a matter of public interest, they were made with actual malice or a reckless disregard for the truth.

II. The court committed error in excluding evidence of "ill-will malice" on the basis of the definition of "actual malice" in *New York Times v. Sullivan, supra.*

III. The court committed error in granting a motion for nonsuit where there were issues of fact for the jury regarding the existence of "actual malice," or reckless disregard for the truth.

FACTS

Fleishman was scheduled to speak at Oakwood School on February 8, 1968, on the topic of "The Sexual Revolution, Obscenity and 'The Beard' ". Information regarding the topic of that speech was publicly announced in the press and approximately fifty persons paid the $1.00 admission charge to attend. Under orders from their superior, McFee and Greenlees paid $1.00 to attend that speech and positioned themselves in the front row, with the intent of recording Fleishman's words with a tape recorder.

Fleishman, McFee and Greenlees were "well acquainted with each other" and Fleishman recognized both officers as vice-squad officers. Fleishman told his audience that as a result of the officers' attendance at his speech, he was changing his topic somewhat. The major portion of his speech was then directed toward a play entitled "The Beard", the police action designed for its suppression and the litigation which ensued as a result. During the speech, Fleishman made several allegedly defamatory statements regarding McFee, Greenlees, and vice-officers in general. (Exhibit A, transcript of Fleishman's speech, contains those references.)

At trial, the court and counsel agreed and the jury was instructed that the trial would be limited to two specific defamatory remarks allegedly made by Fleishman:

1. That McFee and Greenlees "go around planting things on people so they can make a crime out of them and arrest them."

2. That in response to a question from the audience as to what happenes to all the evidence seized

in obscenity cases, Fleishman said, "I don't know, but a good part of it has a way of disappearing. Why don't we ask these officers to explain themselves."

The complaint charged an innuendo as to statement number 1, that McFee and Greenlees planted evidence on people and as to number 2, that McFee and Greenlees stole evidence and converted it to their own use. At trial, counsel for McFee and Greenlees attempted to introduce into evidence specific examples of Fleishman's allegedly threatening and hostile conduct toward McFee and Greenlees from 1961 through 1968. The trial judge stated that the evidence was not admissible under the *New York Times v. Sullivan, supra,* standard and thereby restricted the introduction of any evidence of such "ill-will malice."

During trial, Greenlees testified that he had never planted evidence on anyone nor had he stolen any evidence confiscated in an obscenity action. It was stipulated that if Officer McFee was called he would testify that he had never planted evidence nor stolen evidence either.

Fleishman was called as an adverse witness pursuant to section 776 of the Evidence Code. He testified that as of the date of his speech at Oakwood School, he had a good faith belief that McFee planted evidence on some of his clients. He stated that he had no specific knowledge as to evidence planted by Greenlees. Fleishman also testified that at the time he made the speech, he believed that Greenlees and McFee seized pornographic material for their own purposes. Fleishman testified at length as to the reasons for his various beliefs regarding those vice-officers. As an example of the basis for his belief, Fleishman testified that

he believed that in the "*Haddad* case" McFee planted a manuscript entitled, "The Devil's Advocate" in a trash bin. A former deputy district attorney named Chaney testified that in the *Haddad* case, a witness named Graham had testified that he had put the manuscript of "The Devil's Advocate" in the trash bin. It was stipulated that McFee denied that he did.

At the conclusion of plaintiffs' case, a nonsuit was granted on the basis that the plaintiffs failed to prove actual malice as enunciated in *New York Times v. Sullivan, supra.* McFee and Greenlees appeal from that judgment.

DISCUSSION

At the time of trial, Greenlees had been in the sheriff's office for twenty-five years, nineteen of which had been in investigation of crimes, commonly referred to as vice. McFee did not testify at trial, but in an affidavit he averred that he was a sergeant assigned to the Los Angeles Sheriff's Vice-Bureau and had been so assigned since 1958. McFee and Greenlees' superior, Captain Block, directed them to attend Fleishman's speech. Attending speeches on the subject of obscenity and censorship were part of their routine duties. Fleishman contends that the trial court properly found that at the time of Fleishman's speech, McFee and Greenlees were public officials. We agree.

In the landmark case of *New York Times v. Sullivan, supra,* the court said:

"We have no occasion here to determine how far down the ranks of government employees the 'public official' designation would extend . . ." (*Supra* at p. 283, n. 23.) Since that decision the court has never expressly defined the categories of persons who would or would not be included. However, in *Time*

Inc. v. Pape, 401 U.S. 279, 284 [28 L.Ed.2d 45, 91 S.Ct. 633], the court accepted the determination of the lower court that the deputy chief of detectives and a lieutenant of police of the Chicago Police Department were public officials.

In *Rosenblatt v. Baer,* 383 U.S. 75 [15 L.Ed.2d 597, 865 S.Ct. 669], the Supreme Court established some guidelines for defining who can be classified as a public official.

"It is clear, therefore, that the public official designation applies *at the very least* to those among the hierarchy of government employees who have, or appear to have, substantial responsibility for or control over government affairs . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . the *New York Times* malice standards apply." (Emphasis added.) (*Supra,* pp. 85-86.)

We conclude, for purposes of this appeal, that police officers are government employees. As police officers, McFee and Greenlees clearly had "substantial responsibility for or control over government affairs", especially while acting in their official capacity in the area of the enforcement of obscenity laws. Their presence at Fleishman's speech was in the performance of those public duties; in that performance they were public officials.

In California, cases involving defamation of public officials have concerned themselves mainly with an interpretation of Civil Code section 47(3), rather than

with the precise question of who is a public official. The Civil Code provides:

"A privileged publication or broadcast is one made . . . 3. in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information." (West's Civ. Code, §47 [1954].) The rationale for this Civil Code section was stated in *Jones v. Express Publishing Co.*, 87 Cal.App. 246, 255:

"The doctrine of privileged communications rests essentially upon public policy. Under the proper circumstances the interest and necessities of society become paramount to the welfare or reputation of a private individual, and the occasion and circumstances may for the public good absolve one from punishment for such communications even though they be false."

In *Williams v. Daily Review Inc.*, 236 Cal.App.2d 405, 416-417, the court stated that the "fair comment" privilege, as contained in Civil Code section 47 allows a person to make "fair comment" on matters of public interest. In discussing that Civil Code section the court said:

"The crucial issue involved in determining the application of the "fair comment" privilege is whether or not the publication is made in the public interest."

From these authorities, it seems evident that the California courts have extended the privileged comments to not only a person who is a public official, but

also to matters of public interest. (See "Defamation of a Public Official", 1 U.S.F.L.R. 356.)

In the case before us, it is clear that Fleishman's alleged statements were made regarding a topic of public interest. The field of pornography and obscenity in the period just preceding Fleishman's speech generated intense public scrutiny and discussion. There was prolonged public controversy over the precise subject of that speech, the presentation in Los Angeles of "The Beard." The fact that McFee and Greenlees were present in their official capacities could be said to further attest to the fact that the speech itself was a matter of public concern. In attending Fleishman's speech, McFee and Greenlees were performing official duties regarding a subject of public interest; their active involvement in this area of public interest, in addition to their presence at the speech itself, invited comment as to their official conduct in this area. If Fleishman's comments were indeed made without malice or a reckless disregard for the truth, then those comments are privileged.

In the case of *New York Times v. Sullivan, supra,* the Supreme Court said that in order for a public official to recover damages for defamation, it must be proven that the statements made about that official were made with "actual malice", *i.e.*, "knowledge that it was false or with reckless disregard of whether it was false or not." (*Supra*, pp. 280-281.) The problem presented in this case is whether or not evidence of "ill-will malice" may be admitted to prove the New York Times "actual malice" standard. It is clear that any California requirement for proof of malice in a statement made regarding a public official involved in an area of public interest must also meet the consti-

tutional standards enunciated in *New York Times, supra.* But, in the New York Times case, the Supreme Court did not go so far as to prescribe the particular way in which a plaintiff in a defamation action in a state court must plead (or prove) "actual malice." (*Noonan v. Rousselet,* 239 Cal.App.2d 477.)

In *Kapellas v. Kofman,* 1 Cal.3d 20, the Supreme Court, in reversing an order sustaining a demurrer to a libel complaint regarding a public official, held that detailed facts of ill-will malice as alleged in plaintiff's complaint were sufficient to sustain the pleadings on the constitutional requirements of malice. There the court allowed evidence of "ill-will malice" to be pled, while recognizing that "the proof of malice must not only satisfy the requirements of [California] statutory privilege but must, of course, meet the demands of the federal constitution." (*Kapellas v. Kofman, supra* at p. 28 n. 6.)

At trial, in the case at bar, the defendants tried to introduce evidence of "ill-will" malice which existed between Fleishman, McFee and Greenlees. The trial judge stated that the evidence would not be admitted under *New York Times v. Sullivan, supra,* and stated that the case of *Kapellas v. Kofman, supra,* was inapplicable. In our view, that ruling was reversible error.

In *Mullins v. Brando,* 13 Cal.App.3d 409, 419-420, the court found that the plaintiffs' allegations that "said statement and publication was made by defendants with evil motive and malice, willfully and wrongfully, and with intent to injure, disgrace and defame plaintiffs and with a wanton and reckless disregard for the truth or falsity of the statements made" were sufficient to sustain the pleading. There the court found that those allegations went directly to the issue of reckless disregard of the truth. (*Supra,* p. 421.)

"Reckless disregard cannot be fully encompassed in one infallible definition." (*St. Amant v. Thompson,* 390 U.S. 727, 730 [20 L.Ed.2d 262, 88 S.Ct. 1323].) There are no limits as to what may be pled to prove reckless disregard. Since the California courts allowed "ill-will malice" to be pled in both *Mullins, supra,* and *Kapellas, supra,* evidence supplying proof of those allegations should be admissible at trial. If that evidence of "ill-will malice" would be admissible as indicated in the above cases, then it should have been admissible in the trial of the case at bar. Although under United States Constitutional standards, ill-will malice cannot be the *only* basis for a finding of malice in cases involving public officials (*Garrison v. Louisiana,* 379 U.S. at p. 73), we hold that evidence of ill-will malice can be introduced to help prove the New York Times standard of "reckless disregard."

McFee and Greenlees were entitled to introduce evidence of the "ill-will malice" between Fleishman and themselves to prove that Fleishman made his statements with reckless disregard for the truth. Because they were denied this opportunity, the case must be reversed. Malice was a jury question. (*Alioto v. Cowell Communications, Inc.,* 519 Fed.2d 777.)

The judgment is reversed.

NOT FOR PUBLICATION.

LORING, *J.**

We concur:

STEPHENS, *Acting P. J.*

ASHBY, *J.*

---

*Assigned by Chairman of the Judicial Council.

APPENDIX B.

Order of Court of Appeal Denying Rehearing.

Clerk's Office
Court of Appeal
Second District
3580 Wilshire Boulevard
Suite 301
Los Angeles, CA 90010

Los Angeles, Cal. JAN 28, 1976

Title McFee vs. Fleishman, No. 45753.

PETITION FOR REHEARING DENIED
Clay Robbins, *Clerk*

APPENDIX C.

Order of California Supreme Court Denying Hearing.

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

March 10, 1976

I have this day filed Order: HEARING DENIED.

In re: 2 Civ. No. 45753, McFee vs. Fleishman.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX D.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. The provisions of California Civil Code §46 are:

> "Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:
>
> 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
>
> 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
>
> 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
>
> 4. Imputes to him impotence or a want of chastity; or
>
> 5. Which, by natural consequence, causes actual damage. [1872; 1945 ch 1498 §2.]"

4. The provisions of California Civil Code §47 are:

> "A privileged publication or broadcast is one made—
>
> 1. In the proper discharge of an official duty.
>
> 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under Section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.
>
> 3. In a communication, without malice, to a person intereted therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.
>
> 4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified

charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.

5. By a fair and true report of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit. [1872; 1873-74 ch 612 § 11; 1895 ch 163 § 1; 1927 ch 866 § 1; 1945 ch 1489 § 3.]"

5. The provisions of California Civil Code §48 are:

"In the case provided for in subdivision 3 of the preceding section, malice is not inferred from the communication. [1872; 1895 ch 163 § 2; 1945 ch 1489 § 4.]"